

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

SOUTHERSBY DEVELOPMENT
CORPORATION,

Plaintiff,

vs.

Civil Action

No. 09-208

BOROUGH OF JEFFERSON HILLS;
WILLIAM L. McVICKER, in his
individual and official capacity,

Defendants.

EXCERPT of Transcript of proceedings on February 13,
2012, United States District Court, Pittsburgh, Pennsylvania,
before Maureen P. Kelly, Magistrate Judge

APPEARANCES:

For the Plaintiff: Paul R. Robinson, Esq.
Edward G. Brandenstein, Esq.

For Defendant Borough: Suzanne B. Merrick, Esq.
For Defendant McVicker: Philip J. Sbrolla, Esq.

Court Reporter: Richard T. Ford, RMR, CRR
6260 U.S. Courthouse
Pittsburgh, PA 15219
(412) 261-0802

Proceedings recorded by mechanical stenography; transcript
produced by computer-aided transcription

1 (Excerpt of proceedings held February 13, 2012).

2 (Proceedings held in conference room).

3 THE COURT: I have gone through in great detail the
4 motions in limine and I, quite frankly, appreciate the manner
5 in which all of you approached it in the context of being
6 direct and to the point and citing the key cases or the key
7 information that was needed for the Court to decide.

8 I believe I am going in numerical order in terms of
9 the filing of the motions in limine. The first motion in
10 limine I am going to deal with is Southersby's motion
11 in limine to basically exclude evidence or references to
12 Southersby's Washington Square or Washington Point -- what's
13 the appropriate name for that?

14 MR. ROBINSON: Washington Square, Your Honor.

15 THE COURT: Washington Square development.

16 Having reviewed the motion and brief and
17 Defendants' responses, it's this Court's ruling that the
18 Washington Square development is not relevant to this case.
19 It is not relevant to the Patriot Pointe development claims.
20 Therefore, the motion in limine is granted and Defendants may
21 not make reference to or introduce evidence of Washington
22 Square or, quote, other developments in the borough by the
23 Plaintiff.

24 Next I have two motions in limine that were filed
25 by Mr. McVicker. Is that correct, Mr. Sbrolla?

1 MR. SBROLLA: That's correct, Your Honor.

2 THE COURT: The first is Mr. McVicker's motion in
3 limine to preclude any evidence or testimony regarding his
4 discrimination lawsuit against the borough arising from his
5 termination.

6 I have reviewed the motion, the brief, and the
7 responses as well; and I am going to deny the motion in
8 limine. I believe that evidence of payment of \$300,000 to
9 Mr. McVicker to settle a discrimination lawsuit in the same
10 time period as this case is clearly relevant evidence of
11 possible bias of Mr. McVicker as a witness in this case. So
12 that motion in limine is denied and I will admit evidence of
13 the amount of the payment to settle his age discrimination
14 claim.

15 Also, the second motion that I have from
16 Mr. McVicker is the motion in limine to preclude any evidence
17 or testimony regarding the Borough of Jefferson Hills
18 purchasing Mr. McVicker's residence. I have reviewed that,
19 and that is slightly more removed in time than the
20 discrimination claim, although having read both the motion,
21 the brief, and the response from the Plaintiff, as well as
22 doing some research on my own, I am going to deny this motion
23 in limine. I believe that evidence of the borough's purchase
24 of a key witness and a party's home is relevant possibly of
25 bias as well as to the claims of Southersby that there was

1 disparate treatment with regard to the borough's acceptance of
2 responsibility for a landslide occurring on the property of a
3 resident as opposed to the borough's acceptance of
4 responsibility and how that was handled in terms of the
5 treatment of Southersby. So that motion in limine is denied.

6 Next I have, I believe, four motions in limine from
7 the Borough of Jefferson Hills. The first, which is at ECF
8 No. 140, is a motion in limine to exclude expert testimony of
9 Timothy and Ann Murphy. The borough seeks to deny it on the
10 grounds of Federal Rule of Civil Procedure 26(a)(2) that no
11 later than 90 days before the date set for trial a party must
12 disclose the subject matter on which an expert witness is
13 expected to present evidence and a summary of the facts and
14 opinions.

15 I note that in Plaintiff's pretrial statement that
16 was filed on October 3rd the Murphys are listed as experts.

17 At this time I am going to defer ruling on specific
18 testimony. Quite frankly, based on what I have read about
19 this case, I am not quite sure, and I haven't seen any
20 identification as to on what grounds Mr. Murphy or Mrs. Murphy
21 would be proffered as experts, so we will address that at the
22 particular stage in the testimony.

23 Paul, I will instruct you not refer to them in your
24 opening as experts in any particular area or anything like
25 that, although I don't anticipate that you would. But the

1 pretrial doesn't state what specific subject area they would
2 be called to testify in, and, quite frankly, I am concerned as
3 to what they would be proffered for as experts.

4 MR. ROBINSON: What we had done, Judge, is they
5 have given deposition testimony and answered questions over so
6 many different issues, I am not certain it would be considered
7 expert testimony as well. But there should be no doubt that a
8 number of subjects that were inquired into of Mr. Murphy and
9 Mrs. Murphy could be deemed to be development related issues,
10 earth movement issues that would be beyond the knowledge of an
11 average lay person.

12 So we wanted to be certain to at least make them
13 aware that the subjects of inquiry that were made during their
14 depositions may also be the subject of their testimony at
15 trial and it may be considered expert testimony.

16 THE COURT: Now, I will let them testify as lay
17 people who work in this industry, but I don't see at this
18 point -- I mean, we will cross each step as we get to it --
19 that they are sort of specialized experts in a particular
20 area. But they all obviously have experience in development
21 work and there may be questions based on their experience as
22 lay people, but not as, quote-unquote, experts. So I am not
23 per se granting or denying the motion, but I want all of you
24 to know where I stand.

25 The next motion in limine is a motion in limine to

1 exclude evidence regarding Ryan Homes' injuries and damages
2 resulting from the delay in the issuance of the sewer tap
3 permits. This is Jefferson Hills' motion at ECF No. 144.

4 This motion in limine, after reviewing all the
5 filings of the parties, I am going to grant in part and deny
6 in part. First, Ryan Homes is not a party to this case.
7 Therefore, I am granting the motion in limine as to the
8 introduction of any damages sustained by Ryan Homes as a
9 nonparty.

10 I am denying the motion in limine as to damages
11 sustained by Southersby as a result of the conduct of the
12 borough, including damages in the delay of the issuance of
13 sewer tap permits or damages that Southersby sustained because
14 of Ryan not being able to accept lots for purchase because of
15 sewer tap issues.

16 So the motion of the borough is granted as to
17 damages sustained by Ryan, because that is not part of this
18 case; but denied as to damages sustained by Plaintiffs
19 relative to a number of issues, including sewer tap permits.

20 Next, the next motion in limine is ECF No. 142,
21 which is a motion in limine by the borough to exclude evidence
22 relating to the prohibition on the use of slag in the
23 construction of Patriot Pointe I and II. Here Jefferson Hills
24 argues that the development agreement did not permit the use
25 of slag and that the borough did not permit the use of slag

1 until 2009, after Patriot Pointe I and II.

2 Plaintiff claims they were denied their right to
3 use slag, contrary to PennDOT publication 408, air cooled
4 slag, and that Jefferson Hills did not include the, quote, no
5 slag provision in any other developer agreements.

6 At this point I am going to defer ruling on this
7 until after the motion for summary judgment is ruled on. So
8 we will address this following ruling on the pending motions
9 for partial summary judgment.

10 Next is the motion in limine filed by the Borough
11 of Jefferson Hills to exclude evidence relating to Plaintiff's
12 state law negligence claim. I have reviewed the motion, the
13 response, and the brief in support; and I am going to grant in
14 part and deny in part the Defendant's motion in limine.

15 It is granted in part to the extent that evidence
16 of Jefferson Hills' negligence regarding Plaintiff's state
17 claim is not relevant; but it's denied in part to the extent
18 that evidence of the borough's disparate treatment of
19 Southersby is relevant to Southersby's equal protection claim
20 and breach of contract claim.

21 Then, last, is ECF No. 138, which is the motion in
22 limine of the Borough of Jefferson Hills to exclude evidence
23 of other litigation between the parties. Here the borough
24 seeks to exclude evidence on three issues.

25 First, the age discrimination settlement payment of

1 \$300,000 to Mr. McVicker; and I am going to deny that part of
2 the motion in limine for the same reasons that I denied
3 Mr. McVicker's motion in limine on that issue. That is
4 evidence potentially of bias of a party and a witness.

5 Second, the borough seeks to exclude evidence of
6 the litigation between McVicker and the borough regarding his
7 prior home in the borough and the borough's purchase of the
8 McVicker house after the landslide. For the reasons I stated
9 earlier in response to Mr. McVicker's motion in limine, this
10 Part 2 of this motion in limine is also denied. That payment
11 in that case is evidence -- can be potentially construed as
12 evidence of bias and disparate treatment.

13 Then, lastly, the third component of the motion in
14 limine, which is at ECF No. 138, the borough seeks to exclude
15 evidence of the suit brought by Southersby against the borough
16 in the Court of Common Pleas of Allegheny County in which it
17 claimed that the borough violated the Pennsylvania
18 Municipalities Planning Code and Municipality Authorities Act
19 by the manner in which it collected sanitary sewer tap fees.
20 I am going to deny that portion of the motion as well.
21 Obviously the sewer tap fee issues are evidence of Plaintiff's
22 claim of disparate treatment.

23 However, I caution all parties, in particular
24 Plaintiff, that this trial of this case is not to be a
25 relitigation of that state court claim. Evidence can be

1 presented that a claim was filed, what happened, but I do not
2 want that relitigated because this needs to stay on focus as
3 to what the claims are in this case, in particular the claim
4 of disparate treatment.

5 So that is the Court's ruling on all of the motions
6 in limine, and just the motion in limine on the slag that the
7 borough had filed, I have deferred ruling on it at this point.
8 I have read everything, but we will wait until the ruling on
9 the motion for partial summary judgment of both Defendants is
10 issued.

11 That concludes my list but for one item. Is there
12 anything else that the Plaintiff needs to raise?

13 MR. ROBINSON: No, Your Honor. No, I think that is
14 everything that I covered. Thank you for handling those
15 motions in limine at this time so we can have that knowledge.

16 THE COURT: It is always helpful when you are a
17 week out to know how things are going to go so you can prepare
18 your openings and things like that.

19 Suzanne, is there anything else you need to me deal
20 with?

21 MS. MERRICK: No, thank you.

22 THE COURT: Phil?

23 MR. SBROLLA: Just sitting here thinking about it,
24 we are putting together, it sounds like, a master list of
25 exhibits. Part of the joint stipulations is going to be what

1 we can stipulate to. How would the Court like us to approach
2 documents that we can't stipulate to or there are going to be
3 objections, should we supply the Court with a chart?

4 THE COURT: That's a very good question and I
5 appreciate you asking it. What I think would be helpful is
6 when you prepare Plaintiff's master list of exhibits,
7 Defendants' master list of exhibits, if you make four
8 columns -- one, the identifier, letter and/or number; second
9 column, the description of the exhibit; and then over to the
10 far right if you do two columns, authenticity, admissibility.

11 MR. SBROLLA: And if we have an objection, would
12 the Court like us to note the objection in the column as a way
13 to assist? That way -- I don't know if the Court wants to
14 make rulings ahead of time.

15 THE COURT: No, we are going to take each exhibit
16 as we get to it. But if you just put either -- if it's agreed
17 to as to authenticity or admissibility, just put an X so I
18 know. If it's not, my guess is the objection is probably
19 going to be to admissibility, just put O-B-J, then I will
20 know. But that way when I'm on the bench, I have a master
21 list that I can have with the binder, so I will have that
22 master list for Plaintiff's exhibits and that master list for
23 Defendants' exhibits.

24 And I don't know if the two of you have talked
25 about doing one set of defense exhibits. I think that would

1 streamline it, but I don't want to tell you what to do.

2 MR. SBROLLA: I think what we initially did was put
3 together our lists, we circulated them last Friday, but we
4 will sit down and consolidate. To the extent Paul has one of
5 my exhibits, I don't need to duplicate it.

6 MR. ROBINSON: I am sure we have duplicates.

7 THE COURT: Anything further you need to bring up?

8 MS. MERRICK: No, no.

9 THE COURT: Phil, anything from you?

10 MR. SBROLLA: No.

11 THE COURT: Okay. Then what I would like to do is
12 conclude the conference. I just want to briefly talk to each
13 side to see if you've made any progress in terms of
14 settlement. We've tried diligently a number of times to
15 settle this case, so I am not hopeful, but you may surprise
16 me. Then once we conclude that, then go into the courtroom
17 and we can take a look at the space and you can take a look at
18 the technology and things like that.

19 MR. ROBINSON: Sounds great.

20 THE COURT: Thank you. That concludes the pretrial
21 conference.

22 (Record closed).

23 C E R T I F I C A T E

24 I, Richard T. Ford, certify that the foregoing
is a correct transcript from the record of proceedings in the
above-titled matter.

25 S/Richard T. Ford _____